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there is no express stipulation that they shall be fit for that purpose, there is an implied warranty that they shall be fit." This is certainly a very equitable and just principle, and one which is quite susceptible of controlling the present case, without any unreasonable extension. We believe the tendency of modern decisions, in regard to the harsh

and unreasonable application of the maxim *caveat emptor*, is in the right direction. We therefore coincide fully with the decision of Mr. Justice CLIFFORD in the principal case. We only wish to have it brought to the decision of the full bench. Our doubts do not extend beyond that.

I. F. R.

Supreme Court of Pennsylvania.

CHASE vs. MILLER.

Contested Election—Constitutionality of Military Vote outside of State.

1. This Court has jurisdiction to review and correct the proceedings of inferior Courts, except where it is expressly excluded by statute, or in a case stated by the parties, wherein they agree to submit their disputes to auditors or referees of the Common Pleas without expressly reserving their right to a writ of error. The presumption in the latter case is, that the parties mean to bind themselves by the award of the domestic tribunal of their own choice.
2. This Court has jurisdiction of a contested election, on *certiorari*, where it appears from the record that no facts were in dispute; hence the rulings of the Court below upon questions of law purely are reviewable here.
3. This Court is as much bound to take cognisance of questions involving the constitutionality of the election laws, even though they may be raised in a contested election, as they are to pass upon the constitutionality of an Act of Assembly relating to any other subject, as long as the Legislature does not take away that jurisdiction.
4. The 155th section of the Act of 2d July, 1839, giving to Courts of Quarter Sessions the same powers that are conferred on committees of the Legislature, to compel the attendance of witnesses and the production of papers in contested elections, is only a grant of power for the specific purposes named, and does not make the decision of the Court below, like that of the Legislature, final and conclusive.
5. Bills of exceptions are not allowed in the Courts of Quarter Sessions, therefore no question which arises outside of the record can be reviewed by this Court.
6. Election districts, within the meaning of our statute, denotes subdivisions of Pennsylvania territory, marked out by known boundaries, prearranged and declared by public authorities; and election districts mean in the Constitution

just what they mean in the statute. The Constitution recognises them as among the civil institutions of the State, which can neither be created, nor controlled by the military power.

7. The term "residence" in the Constitution is the same as domicil—a word which means the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights.
8. The right of a soldier to vote, under the Constitution, is in the district where he resided at the time of his entering the military service.
9. The 43d section of the election law of 2d July, 1839, allowing soldiers to vote outside of the boundaries of the State, is in direct conflict with the amended clause of the 3d article of the Constitution of Pennsylvania, and is, therefore, null and void.

Appeal from and *certiorari* to the Quarter Sessions of Luzerne County.

A complaint of upwards of twenty qualified electors of Luzerne county, setting forth an undue election and false return of Ezra B. Chase to the office of District Attorney of said county, was filed 29th November, 1861.

On December 24, 1861, an agreement between the parties as to the facts to be submitted as a case stated, was filed. This agreement submits the question of the constitutionality of an Act of Assembly of Pennsylvania, allowing volunteers in military service to vote wherever they may be on the day of election, and the commanding officers to transmit their return of votes, tickets, &c., to their respective counties to be counted in the general return. The facts of the case appear at large in the opinion of the Supreme Court. The Court below decided in favor of the constitutionality of the military vote, and decreed accordingly.

The case was argued on behalf of the appellant by Messrs. *Stanley Woodward*, and *Lyman Hakes*, who cited Sect. 1, Art. 3, of the Constitution of Pennsylvania; *McDaniel's Case*, 4 Penn. L. Jour. 312; *Cooper vs. Gilbraith*, 3 W. C. C. R. 546; Story's *Confl. Laws* 50, 51; Kent's *Com.* 431, note E.; 1 *Bouv. Inst.* 96, 99; *Guier vs. O'Daniel*, 1 *Binn.* 352; *U. S. vs. Penelope*, 2 *Peters' Adm.* 450; 9 *Deb. Penna. Const.* 300. The Constitution requires a residence of ten days immediately preceding the election in the election district. This restriction is to be strictly construed. The

Legislature have no power to modify a constitutional restriction upon the voting privilege.

Messrs. *S. P. Longstreet* and *G. M. Wharton*, for appellees, cited *Overseers vs. Brown*, 1 Harris 390; *Canal Co. vs. Keiser*, 7 Harris 134; *Carpenter's Case*, 2 Harris 486; *Commonwealth vs. Nathans*, 5 Barr 124; *Wallington vs. Kneass*, 3 Harris 313, 7 Watts 527; *Mifflin Township vs. Elizabeth*, 6 Harris 17; *Commonwealth vs. Clarke*, 7 W. & S. 127; Act of 26 April, 1844; *Commonwealth vs. Hartman*, 5 Harris 119; *Commonwealth vs. McWilliams*, 1 Jones 70; *Commonwealth vs. Maxwell*, 3 Casey 458; *R. R. Co. vs. Casey*, 2 Casey 300; *Kilpatrick vs. Commonwealth*, 7 Casey 215; *Bank of Kentucky vs. Schuylkill Bank*, 1 Parsons 223. A constitution is not to receive a technical but a liberal construction. There is nothing in the Constitution to prevent the Legislature from establishing for the convenience of the people, different places to receive votes for the same election district; nor is there anything to prevent their establishing, for the convenience of the voters of a district, a place outside of the district for holding the election. Express prohibition is necessary to oust the authority of the Legislature.

The opinion of the Court was delivered May 22d, 1862, by

WOODWARD, J.—This is a case of contested election. It comes up to us by writ of *certiorari*. A motion was made and fully argued, to quash the writ on the ground that the decree of the Court below is final and conclusive, and that we have no jurisdiction to review it. The first point to be considered, therefore, is our jurisdiction; for if there be any doubt on that head, we shall be more than willing to escape the constitutional question upon the record.

[A portion of the opinion, not referring to the main question of constitutionality, is omitted, on account of the extreme length of the case.]

An election for District Attorney was held in Luzerne county, last October, at which Ezra B. Chase and Jerome G. Miller were the candidates. After counting what the return judges considered

legal votes, they gave their certificate of election to Chase, but twenty qualified electors filed their complaint in writing, setting forth an undue election, and a false return of Chase, and thus this contest was inaugurated. Besides complaining of a large number of fraudulent votes cast within the county, the petitioners set forth that "on the day of election certain citizens of the Commonwealth, being qualified electors of the county of Luzerne, and then in the actual military service in certain detachments or companies of volunteers, under a requisition from the President of the United States, and by the authority of the Governor of the Commonwealth, did, agreeably to law, hold an election for the purpose of electing county officers of Luzerne;" and then follows a detailed statement of the votes cast by different companies for the office of District Attorney, and a complaint that the return judges excluded the vote of the volunteers, and issued their certificate in disregard of it.

The petitioners did not give the names of the military voters, nor tell the Court where they voted. Exceptions were filed to the complaint, one of which was that the place of voting was not disclosed, but the Court overruled the exceptions, and refused to quash the complaint or compel it to be amended in this particular.

Pending the proceedings upon this petition, the parties, on the 24th of December, 1861, entered into, and, with the leave of the Court, filed of record, a written agreement in these words:

"It is agreed the following facts be submitted as a case stated for the Court's decision. Admitted that of the votes polled within the county of Luzerne, Ezra B. Chase received 5811 votes, and that Jerome G. Miller received 5646, and that the said number of votes by each received be counted by the Court as legal votes. That of the votes polled by the volunteers in the army, Ezra B. Chase received 58 votes, Jerome G. Miller received 362 votes. But the legality of the votes polled by the volunteers in the army not being admitted, the question as to the legal effect thereof is submitted as a matter of law for the Court. If the Court should be of opinion that the army vote is constitutional and legal, the same to be allowed by the Court, and added to the vote cast in the county for the party or parties in whose favor they may be, and then the

Court to decree in favor of the party having the greatest number of votes. If no part of the army vote is received, the decree to be in favor of Mr. Chase, the army vote being taken as above stated, the objections to it being all waived, except as to its constitutionality."

On the 6th of January, the Court made their decree "upon the written statement of facts agreed to by the parties, and filed upon the 24th December ultimo, no other evidence being offered," which was to the effect that the army vote was legal, that it should be counted, and that it gave a majority to Miller, to whom the office was awarded.

* * * * *

The "army vote," as it is most loosely called in the agreement of 24th December, was cast somewhere, and counted in pursuance of section 43d and the sections immediately succeeding of the general election law of 2d July, 1839, Purdon 289. The 43d section is in these words:

"Whenever any of the citizens of this Commonwealth, qualified as hereinbefore provided, shall be in any actual military service in any detachment of the militia or corps of volunteers under a requisition from the President of the United States, or by the authority of this Commonwealth, on the day of the general election, such citizens may exercise the right of suffrage at such place as may be appointed by the commanding officer of the troop or company to which they shall respectively belong, as fully as if they were present at the usual place of election: *Provided*, That no member of any such troop or company shall be permitted to vote at the place so appointed, if at the time of such election he shall be within ten miles of the place at which he would be entitled to vote if not in the service aforesaid."

This section and its sequents are virtually a reprint of the Act of 29th March, 1813, 6 Smith's Laws, p. 70. The proviso of that Act prescribed two miles from his usual place of voting as the condition on which the volunteer in actual service might exercise suffrage elsewhere. Such a proviso, whether two miles, as in the Act of 1813, or ten miles, as in the Act of 1839, is an intimation

of that which we have other reasons for believing, that the Legislature of neither of those years had any thought whatever of legalizing military voting outside of our own territorial limits. They probably meant to give the citizen soldier who should be in actual service within the State on the day of the general election, an opportunity to vote, if his engagements detained him at the prescribed distance from his domicile. And so understood, there was nothing in the State Constitution, when the Act of 1813 was passed, which its terms could be thought to contravene. The Constitution of 1790 was then in force, and the qualifications of an elector which that instrument prescribed, were that he should be a freeman of the age of twenty-one years; that he should have resided in the State two years next before the election, and within that time paid a State or county tax, which should have been assessed at least six months before the election—or he should be a son, between twenty-one and twenty-two years of age, of a citizen qualified as aforesaid. This was the constitutional rule, and the whole of it, up to January 1, 1839, when the amended Constitution of 1838 took effect; and, therefore, when the revisers of our civil code, who were very competent constitutional lawyers, reported in 1834 a general election law, substantially the same that is now in force, they did not hesitate to retain the substance of the Act of 1813. Had their report been made after the Constitution of 1838, we would scarcely have expected them to incorporate the provisions of the Act of 1813, for, as we shall see hereafter, the Constitution of 1838 made the place of voting an element of suffrage.

For five years their report was not taken up by the Legislature, and when near the close of the long session of 1839, it came up, the Legislature passed it pretty much in the words submitted by the revisers, without adverting to the changes which in that interval of five years had taken place in our fundamental law. We are not to wonder at this, for instances of even more careless legislation are not uncommon. The Act, a long one, made up of 157 sections, was not touched until a late day of the session, and was adopted by the two houses on the 25th June—the very day they adjourned. It was signed by the Governor on the 2d July, 1839, which gave

the Act its date. If, in the hurry of closing a long session of the Legislature, any one of the numerous provisions of the Act suggested a constitutional doubt to the mind of a single member, he doubtless dismissed it upon faith in the revisers, without remembering that he was called to consider a very different constitutional question from any that engaged their attention. Tradition tells of no constitutional debates on the Act of 1839 in the Legislature that passed it. I mention these circumstances as showing how inconclusive is the argument which the learned Judge below attempted to deduce in favor of the constitutionality of the Act, from the high character of the revisers and many of the members of the Legislature.

The great question now before us is, whether the 43d section of the Act can be reconciled with the 1st section of article 3d of the amended Constitution? Having already quoted the 43d section, I will bring into contrast with it the very terms of the constitutional provision:

“In elections by the citizens, every white freeman of the age of twenty-one years, having resided in the State one year, *and in the election district where he offers to vote ten days immediately preceding such election*, and within two years paid a State or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector. But a citizen of the United States who had previously been a qualified voter in this State, and removed therefrom and returned, and who shall have resided in the election district and paid taxes as aforesaid, shall be entitled to vote after residing in the State six months: *Provided*, That white freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the State one year, and in the election district ten days, as aforesaid, shall be entitled to vote, although they shall not have paid taxes.”

By comparing this clause with the corresponding provision of the Constitution of 1790, it will be seen in what the amendments consisted. The word “white” was introduced before “freemen,” excluding thereby negro suffrage, which had prevailed to a slight extent. The State residence was reduced from two years to one,

and the words requiring a residence in the election district where he offers to vote, were added.

This latter amendment was probably suggested by the registry law, which was passed in 1836, for the city and county of Philadelphia, the main object of which was to identify the legal voter before the election came on, and to compel him to offer his vote in his appropriate ward or township, and thereby to exclude disqualified pretenders and fraudulent voters of all sorts. The idea of a registry of legal voters as means to purity of elections was hinted by Chief Justice TILGHMAN in *Catlin vs. Smith*, 2 S. & R. 266. When the third article came up in the Convention of 1838 the political party who had favored the Philadelphia registry law, brought forward and supported this amendment as calculated to accomplish substantially the same results for the whole State which the registry law proposed to accomplish for Philadelphia. The political party to whom the registry law had always been distasteful, opposed the amendment as an unnecessary clog upon freedom of suffrage, but on a division it was adopted by a vote of sixty-four to sixty, every member from the city of Philadelphia, where the registry law had proved acceptable, voting for it, and every member from the county of Philadelphia, which had never relished the registry law, voting against the amendment: Con. Deb. vol. ix., p. 300, *et seq.*

Regarding the amendment as designed in general to exclude fraudulent voting, the question now is, what construction shall be given to its particular phraseology? Construing the words according to their plain and literal import (and we must presume that the people of Pennsylvania construed them so when they adopted the amendment), they mean, undoubtedly, that the citizen possessing the other requisite qualifications is to have a ten days' residence in an election district, and is to offer his ballot in that district. The second section of this article requires all popular elections to be by ballot. To "offer to vote" by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. The ballot cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts and certified

into the county where the voter has his domicile. We cannot be persuaded that the Constitution ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. The Constitution meant, rather, that the voter, *in propria persona*, should offer his vote in an appropriate election district, in order that his neighbors might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.

The amendment so understood, introduced not only a new test of the right of suffrage, to wit, a district residence, but a rule of voting also. Place became an element of suffrage for a two-fold purpose. Without the district residence no man shall vote, but having had the district residence, the right it confers is to vote in *that district*. Such is the voice of the Constitution. The test and the rule are equally obligatory. We have no power to dispense with either. Whoever would claim the franchise which the Constitution grants, must exercise it in the manner the Constitution prescribes.

But, be it observed, the Constitution does not define an election district, and therefore I hold that it referred the definition to the legislature. The words "election district," do not occur in the Constitution of 1790. The word "district" was often applied by that instrument to subdivisions of the State for senatorial, representative, and judicial purposes, but never for purposes of general elections. Election districts acquired their first constitutional recognition in 1838. They had, however, long been familiar to our ordinary legislation. "When any township or townships hath or have been divided, or hereafter shall be divided, in forming any *election district*, an inspector shall be chosen for each district," said the 7th section of the Act of 15th February, 1799 (3d Smith's Laws 340), and since that time we have had innumerable Acts of Assembly creating, dividing, and subdividing election districts, until the Legislature grew tired of the subject, and in 1854, turned it over to the Courts of Quarter Sessions, to fix election districts, "so as to suit the convenience of the inhabitants thereof:" Purdon 1069. Always, from 1799 down to the present hour, election

districts, within the meaning of our statutes, have denoted subdivisions of Pennsylvania territory, marked out by known boundaries, prearranged and declared by public authority. Whether composed, as at different periods they have been, of counties, or cities, or townships, or boroughs, of wards, or of precincts, they have always been such subdivisions of our own territory, and no man has ever been known to suggest the formation of an election district by Pennsylvania authority outside of her State borders. Now, whilst the Constitution did not stop to define election districts, it took up and incorporated them as the legislature had theretofore or should thereafter define and regulate them. It referred itself to the legislative will on the subject. And, therefore, election districts mean in the Constitution just what they mean in the statutes. This necessary dependence of constitutional principles upon auxiliary legislation was explained in *Maxwell's Case*, 3 C. 444. We must understand the Constitution, then, as prescribing to the qualified voter, that his ballot is to be cast in such an election district as the Legislature may erect by itself or through the Courts. And the legislative power over election districts is unlimited within our own State. Whether they could form a district *beyond* our territorial jurisdiction for the convenience of our own citizens, is a question which need not be considered, for no such legislation has been attempted. But it is quite clear to our minds that the legislature might erect a military camp within the State into an election district, and the moment they should do so the Constitution would apply itself to that district in the same manner as to any other.

But there must not only be a district to vote in, but there must be a *residence* therein for ten days next preceding the election. This is a part of the condition of suffrage. Undoubtedly the primary signification of the word "residence," as used in the Constitution, is the same as domicile—a word which means the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights, but I am not satisfied that the Constitution meant to limit itself to this strict and technical definition of residence. Referring the subject of election

districts to the legislature, as we have seen that it did, I incline strongly to think that the Constitution meant, also, to leave the subject of residence in an election district to legislative discretion, and, therefore, that the Legislature are as free to declare what shall be residence in an election district for ten days next preceding the election, as they are to prescribe the boundaries of the district. When they have not exercised their power nor attached to the word any other than its ordinary legal signification, it is to be received according to its primary meaning in the Constitution, as equivalent to domicil. But if they should make a military camp in Pennsylvania an election district, and declare that military sojourn and service therein for ten days should be equivalent to a constitutional residence for the purposes of election, I would be extremely loth to think such a law unconstitutional. These observations, however, on the meaning of the word residence, must not be considered as expressing the opinion of the Court, but only my own.

The meaning of the constitutional clause under consideration may, therefore, on the whole, be stated thus—every white freeman, twenty-one years of age, having “resided” according to the primary meaning of that word, or according to legislative definition of it, in any “election district” created by or under the authority of the Legislature, for ten days preceding the election, shall be permitted to offer his ballot in that district.

Having now defined, with all possible clearness, the meaning we attach to the clause of the Constitution in question, we turn next to the consideration of the meaning of the 43d section of the Act of 1839. Like all statutes, it is to be construed, if possible, in a manner that shall be consistent not only with the Constitution, but with the other parts of the same statute. Neither unconstitutionality nor repugnancy are to be assumed, but, if both clearly appear, we ought not to be expected to give the section effect.

The section says that the citizens referred to in its first clause “may exercise the right of suffrage at *such place* as may be appointed by the commanding officer of the troop or company to which they shall respectively belong.”

Now we have seen above that the Constitution prescribes a *place*

for the exercise of the right of suffrage, to wit, an election district. The 43d section does not affect to create an election district. There is not a word in it for that purpose. There is no designation of boundaries, no subdivision of territory, nothing, not a word or thought which bears the slightest relation to our legislation on the subject of election districts. But it is said the place which the commanding officer is authorized to appoint is the substantial equivalent of an election district. Not so for many reasons, for these two particularly: 1st. There is no prior public designation of the place. One purpose of having election districts designated on some public record is, that all parties interested may know where to resort to find the ballot-box. Some go there to vote—others to watch for illegal votes—others to electioneer, but all have an interest in knowing where the law of the land has directed the election to be held. The military commander makes no public proclamation of the place he appoints, no record exists of his appointment. 2d. A second and perfectly conclusive reason why the place fixed by the commander cannot be regarded as an election district is, that the legislature have no power to authorize a military commander to make an election district. It is a part of the civil administration—this designating of election districts—and however it may be committed by one of the three co-ordinate departments of the government to another of these departments, as by the Legislature to the judiciary, no civil function of either department can be delegated to a military commander. This would be to confound the first principles of the government. If the legislature had said in the most express terms that the commander might declare his camp, wherever it might happen to be, an election district, it could have availed nothing, for the Constitution, in referring to the Legislature for election districts, recognised them as among the *civil* institutions of the State, to be created and controlled exclusively by the civil, as contradistinguished from the military power of the State. The Constitution says “the military shall, in all cases and at all times, be in strict subordination to the civil power,” which is marking a distinction between the two powers with great emphasis. To the civil and not to the military

power did the Constitution intrust the formation of election districts, and therefore the civil cannot commit it to the military.

If then the legislature did not and could not authorize the military commander to form an election district, how could there be any constitutional voting under the 43d section? Without an election district there can be no constitutional voting. The 43d section provides for no election district, and no military commander can be empowered to form one—hence it follows, as an inevitable deduction, that the “place” referred to in that section is inconsistent with the constitutional requisition of an election district, and that whenever votes have been cast in pursuance of that section since the Constitution of 1838 came in, they have been cast without authority of law. If the place of voting has been, as in many instances we know it has been, in other States, and in the District of Columbia, the assumptions set up in behalf of it, have only been the more extravagant. For, observe, it has been assumed that the Constitution was intended to have extra-territorial effect; next that the Legislature had power to make election laws to be executed not only in Pennsylvania but in other States also; then that the 43d section established election districts wherever a commander of a troop or company should be pleased to appoint; and, finally, that the presence of the soldier-voter at that place—though it might be on a forced march or in the tug of battle—was *residence* for ten days within the meaning of the Constitution, no word of legislation having ever said it should be so considered. Nay, not only had no legislation authorized this last assumption, but this very 43d section had excluded it, by declaring that the soldiers entitled to vote at the place appointed by military commanders should be “*qualified citizens*.”

A constitutional argument which rests on such assumptions can never be formidable. When a soldier returns to his election district, he resumes all the civil rights of citizenship, and his residence being unimpaired by his temporary absence, he has a right to vote on election day, but under the Constitution, to which his fealty is due, he can acquire no right to vote elsewhere, except by a change of residence from one district to another.

The repugnancy of the 49th section to other sections of the same statute, is as gross as its inconsistency with the Constitution. It says, the "citizens of this Commonwealth qualified as *hereinbefore* provided," shall have the peculiar right of suffrage, which is claimed in this case to be constitutional. This word "*hereinbefore*" is a reference to prior sections of the same statute, but the qualifications for suffrage are not contained in any prior section—another instance of careless legislation. It is not till we get to the 63d section that we come to the subject of qualifications. The 63d section re-enacts the 1st section of the 3d article of the Constitution in terms. If we read the word *hereinbefore* as if it were written *hereinafter*, or if we construe it as referring to the constitutional clause of qualification (and in one or the other of these ways it must be taken), it comes to the same thing—a demand for the constitutional qualifications of suffrage in every soldier who claims to vote under the 43d section. It says in effect, that the soldiers who offer to vote in the election district wherein they have resided ten days immediately preceding the election, shall be entitled to vote in any place their commander appoints, provided it be not within ten miles of the district wherein they have resided for the last ten days—which is downright nonsense. Yet such is the effect of the words "qualified as *hereinbefore* provided," when taken in connection with the other parts of the section—they turn the whole section into jargon.

The 63d section declares, that "no person shall be permitted to vote at any election" provided for by the Act, except he possess the constitutional qualifications which have been already expounded. The 67th section declares that every person qualified as aforesaid "shall be admitted to vote in the township, ward, or district in which he shall reside," and the resolution of 26th April, 1844, put down in Purdon as section 48 of the Act, provides for a person who removes from one ward, borough, or township to another within ten days before the election, and gives him a right to vote in the ward, borough, or township from which he has removed. These legislative regulations of residence in districts are in accordance with that interpretation of the Constitution suggested above, and show clearly how essentially the *place of voting* has entered into the qualifica-

tions of suffrage. The negative words of the 63d, and the affirmative words of the 67th, are very emphatic expressions of the constitutional rule in respect to the place of voting.

Whilst speaking of the legislative control of election districts, it may be proper to advert to a fact, stated in argument, that voters resident in the township of Wilkesbarre, which is an election district, are accustomed to vote in the borough of Wilkesbarre, which is a separate election district, and other similar instances are said to exist in Luzerne county, and in other parts of the State, where votes are actually cast in an election district adjacent to that in which the voters reside. If this practice have the sanction of an Act of Assembly it is defensible; if it have not, I know of no principle on which it can be excused except that of *communis error*. And this is all that we feel called on to say in regard to it, for it is not a circumstance of sufficient magnitude or importance to disturb the course of our argument, or to attract further notice.

To all these sections the 43d, as construed in the Court below, is directly repugnant. It is repugnant also to all those numerous provisions of the Act which require peace officers on demand of an election officer, or of three citizens, to preserve free access to the polls, and to suppress disturbances and riot—which forbid wagering and misconduct at the polls, and which prohibit all troops, “either armed or unarmed,” from attending at any place of election within the Commonwealth.

The 43d section is in direct antagonism to all of these reasonable and conservative provisions. It permits the ballot-box, according to the Court below, to be opened anywhere, within or without our State, with no other guards than such as commanding officers, who may not themselves be voters, nor subject to our jurisdiction, may choose to throw around it—and it invites soldiers to vote where the evidence of their qualifications is not at hand; and where our civil police cannot attend to protect the legal voter, to repel the rioter, and to guard the ballots after they have been cast.

It is scarcely possible to conceive of any provision and practice that could, at so many points, offend the cherished policy of Pennsylvania in respect to suffrage. Our Constitution and laws treat

the elective franchise as a sacred trust, committed only to that portion of the citizens who come up to the prescribed standards of qualification, and to be exercised by them at the time and place and in the manner pre-arranged by public law and proclamations—and whilst being exercised, to be guarded, down to the instant of its final consummation, by magistrates and constables, and by oaths and penalties. All of which the 43d section reverses and disregards, and opens a wide door for most odious frauds, some of which have come under our judicial cognisance. It is due to our citizen soldiery to add, however, in respect to the cases of fraud that have been before us, that no soldier was implicated. The frauds were perpetrated, in every instance, by political speculators, who prowled about the military camps watching for opportunities to destroy true ballots and substitute false ones, to forge and falsify returns, and to cheat citizen and soldier alike out of the fair and equal election provided for by law. And this is the great vice of the 43d section—that it creates the occasion and furnishes the opportunity for such abominable practices. This would be a reason, drawn from our experience of the last half year, for construing it strictly, if strict construction were required. But it is so palpably in conflict with the Constitution, and so repugnant to all the substantial parts of the enactment into which it was heedlessly thrust, that no strictness of construction is called for. Taking the section as it stands—as every reader, whether clerk or layman, would understand it, or as the learned Judge below administered it, we hold it to be subversive of the amended clause of article 3d of the Constitution, and also of the constitutional sections of the general election law of 2d July, 1839.

Having now examined fully the grounds and extent of our jurisdiction, and having stated the meaning of both the constitutional amendment and the enactment in question, and thus developed the irreconcilable antagonism between them, it remains only that we notice, briefly, some of the most prominent arguments that have been urged in support of the enactment. The learned Judge refers himself to several cases, in which this Court have set up judicial implications as to the spirit and meaning of the Constitution, in

order to support Acts of Assembly that were inconsistent with the letter of the Constitution, but he failed to observe that, in all these cases, there was *ground laid in the Constitution itself* to support the judicial implication. Take for example the Acts of Assembly that were discussed in *Zephon's Case*, 7 W. & S. 68, *Kilpatrick's Case*, 7 C. 178, and *Foust's Case*, 9 C. 340, all of which were supposed to conflict with that provision of the Constitution which requires the President Judge of the Common Pleas to be one of the quorum of the Court of Oyer and Terminer. Everybody knows that the Constitution betrayed an anxiety that the trial of high crimes should be presided over by a Judge "learned in the law," and as it provided for no such Judges, except in the instance of the President of the Common Pleas, it, therefore, required *him* to be present in the Court of highest criminal jurisdiction. But when the Legislature provided associate Judges "learned in the law," for certain Courts of Common Pleas, everybody saw how the overruling purpose of the Constitution would be just as well carried out by allowing such associates to constitute the Oyer and Terminer, as by requiring the President Judge to be always present. Founding the judicial implication on the manifest intent and purpose of the Constitution, the Acts of Assembly were held constitutional.

So, in the instance discussed in *Maxwell's Case*, 3 C. 444, the choice of judges by popular election was seen to be the policy and purpose of the Constitution, but the Constitution could not regulate the details of such an election, and therefore referred them to the Legislature to regulate. The Legislature, considering that three months was none too much time for the people to look up a good judge, provided that if a vacancy occurred in less than that time before the annual general election, the choice should be postponed till the general election of the next year—the vacancy being filled, meantime, by Executive appointment. We held the Act of Assembly constitutional, because it aimed at the accomplishment of one of the great and apparent purposes of the Constitution. We could not consider the interval of three months unreasonable, because it was the very period which the Constitution itself fixed for the election of a Governor when a vacancy happened in that

office in the midst of an official term. Thus the grounds of the judicial implication set up in support of the law were derived from the Constitution itself. The same line of remark might be applied to most, perhaps all, of the other cases cited.

But how can it be applied to this case? In what part of the Constitution does it betray the purpose, policy, or desire, that votes should be cast wherever qualified citizens may happen to be on election day? So far from affording any ground for judicial implications of this kind, it studiously excludes them by prescribing the terms of suffrage with as much precision as we would look for in a treatise on mathematics. It does not deal with suffrage carelessly. It withholds it altogether from about four-fifths of the population, however much property they may have to be taxed, or however competent in respect of prudence and patriotism, many of them be to vote. And here let it be remarked, that all our successive fundamental laws have grown more and more astute on this subject. Penn's frame of government, made in April, 1682, gave the right of suffrage to "every freeman of the province;" his laws, agreed upon in England in May, 1682, gave it to every inhabitant of the province who should purchase a hundred acres of land, or who shall have paid his passage, and taken up a hundred acres of land at a penny an acre, and cultivated ten acres thereof; and to every person that hath been a servant or bondsman, and is free by his service, that shall have taken up fifty acres, and cultivated twenty, and to every resident of the province that pays scot and lot to the government. By the Constitution of 1776, every freeman, of twenty-one years of age, having resided in the State one year next before the election, and paid public taxes during that time, was entitled to vote.

Here we see the definition of a voter growing more exact, and in the Constitution of 1790 still more exact, and, finally, in that of 1838, he is to superadd to the other distinguishing marks, a district residence of ten days immediately preceding the election. Now the labor of the Constitution has not been to restrict suffrage in any spirit of distrust of popular intelligence, but it has been to define it so exactly that it might be preserved from abuse and per-

version. The Constitution affords ample ground for judicial implications in favor of legislation that tends to ascertain legal voters and votes with precision and exactitude, but not an atom of ground for implications in behalf of a law that opens the ballot-box anywhere and everywhere, under supervision of military officers wholly unknown to our civil administration, and where no officer can possibly be who is specially charged with the supervision of State elections. Because judicial implications have been set up in behalf of other Acts of Assembly, it does not follow that judicial implications can save this one. In other instances the implication was well grounded in the Constitution—in this instance everything in the Constitution forbids the implication.

The learned Judge deprecates a construction that shall *disfranchise* our volunteer soldiers. It strikes us that this is an inaccurate use of language. The Constitution would disfranchise no qualified voter. But, to secure purity of election, it would have its voters in the place where they are best known on election day. If a voter voluntarily stays at home or goes a journey, or joins the army of his country, can it be said that the Constitution has disfranchised him? Four of the Judges of this Court, living in other parts of the State, find themselves, on the day of every presidential election, in the city of Pittsburgh, where their official duties take them and where they are not permitted to vote. Have they a right to charge the Constitution with disfranchising them? Is not the truth rather this—that they have voluntarily assumed duties that are inconsistent with the right of suffrage for the time being? Such is our case, and such is the case of the volunteers in the army. The right of suffrage is carefully preserved for both them and us, to be enjoyed when we return to the places which the Constitution has appointed for its exercise. It is forcing a gratuitous assumption upon the Constitution to treat it as intending that the volunteer in the public service, shall carry his elective franchise with him wherever his duties require him to go. There is no word or syllable in the instrument to justify the assumption.

A good deal has been said about the hardship of depriving so meritorious a class of voters as our volunteer soldiers of the right

of voting. As a Court of justice we cannot feel the force of any such consideration. Our business is to expound the Constitution and laws of the country as we find them written. We have no bounties to grant to soldiers, or anybody else. It may be said, however, in answer to this suggestion, that the hardship of missing an annual election is one of the least the soldier is called on to endure, and this they share in common with the patriot soldiers of all the loyal States, for it is understood that no State but Pennsylvania has attempted to extend civil suffrage to an army in the field. To voluntarily surrender the comforts of home, and friends, and business, and to encounter the privations of the camp and the perils of war, for the purpose of vindicating the Constitution and laws of the country, is indeed a signal sacrifice to make for the public good, but the men who make it most cheerfully and from the highest motives, would be the very last to insist, weakly, on carrying with them the right of civil suffrage, especially when they see, what experience proves, that it cannot be exercised amidst the tumults of war without being attended with fraudulent practices that endanger the very *existence* of the right. Whilst such men fight for the Constitution, they do not expect judges to sap and mine it by judicial constructions.

Finally, let it be said that we do not look upon the construction we have given the constitutional amendment as stringent, harsh, or technical. On the contrary, we consider it the natural and obvious reading of the instrument, such as the million would instinctively adopt. Constitutions, above all other documents, are to be read as they are written. Judicial glosses and refinements are misplaced when laid upon them. Carefully considered judicial implications may indeed be made from them in support of statutes—never to defeat statutes—when such implications are grounded in the Constitution itself, and tend to accomplish its obvious purposes, as well as to promote the public welfare. But when asked to set up a construction that opposes itself to both the letter and the spirit of the instrument, and which tends to the destruction of one of our fundamental political rights—that free and honest suffrage on which all

our institutions are built—this Court must say, in fidelity to the oaths it has sworn, that it cannot be done.

DECREE OF THE COURT.—And now, to wit: May 22d, 1862, this cause having been argued by counsel, and fully considered by the Court, the motion made on behalf of the contestants to quash the *certiorari* is overruled and dismissed, and it is ordered and adjudged that the decree of the Court of Quarter Sessions of the county of Luzerne, made on the sixth day of January, 1862, be reversed, annulled, and taken for nought, and it is here determined and decreed, that the election and return of Ezra B. Chase to the office of District Attorney in and for the said county of Luzerne, at the general election on the second Tuesday of October last, was not undue or false, as charged by said contestants, but that the said Ezra B. Chase was duly elected to said office, and is entitled, upon taking the proper oath, to all the rights, privileges, and emoluments thereof.

It is further considered and certified, that the complaint of said contestants was not without probable cause, and it is therefore decreed, that the county of Luzerne pay the costs of this contested election.

LOWRIE, C. J., took no part in the decision, having been absent at the time of the argument, on account of death in his family.

THOMPSON, J., dissenting.

*Supreme Court of Pennsylvania.—At Nisi Prius, in Equity.
November Term, 1862.*

Before Justices THOMPSON and WOODWARD.

WILLIAM P. DENNIS vs. HENRY ECHARDT.

Where a lawful business, such as that of tinsmith and sheet-iron worker, is carried on at unseasonable hours to the annoyance and discomfort of neighbors, and until it becomes a nuisance, equity will interfere by injunction to restrain it.

Motion for special injunction.